No. 13675

IN THE

United States Court of Appeals For the Ninth Circuit

EDWARD B. CALDERON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

The jurisdictional statement in appellant's brief, on file, is adopted.

ARGUMENT
SUMMARY.

For purpose of clarity appellee has subdivided its argument into five subdivisions. Subdivisions I and II are directed against Specification of Error No. 2 of Appellant's Brief and Paragraph I of Appellant's argument. Subdivisions II and III are directed against Specification of Error No. 1 and Paragraph II of the Appellant's argument. Subdivision IV raised the independent contention of appellee that the government has proven a violation of the statute by direct evidence, in addition to the proof through the "net worth-expenditure" method. Subdivision V is directed to the balance of Appellant's brief, including Specification of Errors Nos. 3, 4 and 5 and paragraphs III and IV of Appellant's argument.

ARGUMENT

1. THE NET WORTH STATEMENT WAS PLACED IN EVIDENCE BY COUNSEL FOR THE DEFENDANT (R. 195) AND WAS COMPETENT AND SUFFICIENT TO JUSTIFY THE JURY'S VERDICT.

It must be noted at the outset that counsel for the appellant offered the net worth statement in evidence and not the government. (R. 195) Having done so, he cannot complain about inaccuracies therein, or in the testimony relative thereto. (R. 61-71)

Appellant further stipulated (R. 8, 28, 29) that Lloyd M. Tucker, might testify to the "Net Worth Statement" without producing any supporting documents or records with the exception of the items of assets designated as "Cash on Hand" and "Cash in Bank." Nowhere in the record is the Government's evidence as to the voluminous testimony covered by the stipulation controverted, and it must be assumed that the defendant concedes the accuracy of Special Agent Tucker's investigation and testimony, (R. 61-71) as to all net worth figures with the exception of cash in hand and cash in bank.

The evidence as to cash in the bank was clearly competent and accurate. The ledger sheets of the Valley National Bank account in the name of E. B. or Rafaela Calderon was placed in evidence (R. 38; Government's Exhibit 5) and deposits slips to that account were placed in evidence (R. 40; Government's Exhibit 6). The Bank of Douglas Savings account of Mr. and Mrs. Edward Calderon, Account Number 11796 was placed in evidence. (R. 41; Government's Exhibit 7). Deposit slips to that account were placed in evidence separately (R.

42; Government's Exhibit 8). The commercial account in the Bank of Douglas was placed in evidence (R. 44; Government's Exhibit 9). The ledger sheets for the Bank of Douglas account for the Coronado Cafe, owned by defendant, were placed in evidence (R. 45; Government's Exhibit 10).

Errors which appeared in these accounts were adequately adjusted. The error in the Bank of Douglas account of $700.00 was taken into account in the tax computations. (R. 73).

> Q. Was that an error in the compilation between your record and the record of the bank?
>
> A. Yes. This certified copy of this ledger sheet from the Bank of Douglas shows a $700.00 withdrawal on November 4, 1949.
>
> Q. Did you later deduct that from your figures, Mr. Tucker?
>
> A. Yes, sir, I did.
>
> Q. In compiling a new tax? A. Yes.

Other errors relating to cash in bank were clearly explained. (R. 73, 74). Each error in the computation of net worth was taken into consideration in the compilation of tax.

> Q. And in figuring the tax due for the year 1949 did you take into consideration this $700 item you have testified to?
>
> A. I made the proper adjustment. (R. 104)
>
> Q. Now then, Mr. Webb, assuming that in the statement of the bank which was the basis of Mr. Tucker's testimony, statement of the amount in the bank as he based his figures on, there was a $5.00 error, how much difference would that make in the corrected income and in the tax?

A. Approximately $1.00, more or less. (R. 102)

Q. Assuming that there was an error of $48.24, in other words, there would be that much less than the figures that Mr. Tucker testified to, what effect and in what amount would that affect the tax for that year?

A. Approximately $10.00 (R. 103)

There remains the item of cash on hand. The Government's evidence as to this item was received from the defendant. (R. 59).

Q. Did Mr. Calderon during the conversation you have described here, when Mr. Webb was present, and on the date you have described, did he tell you how much Cash on Hand he had at the end of 1945?

A. He stated that at all times that it was customary for him to have cash on hand or in his pocket of about $500.00.

Q. Did he say at that particular time he had $500.00?

A. Yes, he did. And we were talking about year-end balances and he stated to the best of his recollection and belief he would have had $500.00 on hand on the last day of each year. However, with respect to the year 1949. I pointed out to him that on January 4th of 1950 he made a deposit in his bank account of $1,971.50. I asked him if it would be possible for him to accumulate that much cash between January 1 and January 4 and he stated it would not, it must have been some receipts carried over from the end of the year.

Q. Did he inform you how much he had in cash on hand at the end of 1946?

A. Yes, $500.00.

Q. 1947? A. $500.00. Q. 1948? A. $500.00.

Q. And 1949? A. $1,971.50. (R. 58, 59).

This testimony is repeated on page 60 of the Transcript of Record.

The contention of the appellant that he had or might have had substantially more Cash on Hand is not consistent with the admission made on Government's Exhibit 11, (R. 108, 109) which reads in part as follows:

"It has been my practice for the past several years to regularly deposit in my checking account sufficient receipts from my businesses to pay my current bills. Excess receipts I accumulated in my safe for short periods of time and then deposited such moneys in my savings account."

Counsel for the defendant then offered the Net Worth statement signed and sworn to by the defendant, in evidence (R. 195), which sets out the Cash on Hand in accordance with the testimony of Mr. Tucker.

Nor can we be overly concerned with the attempts of the defendant to explain away the evidence as to Cash on Hand.

In *United States v. Hornstein, 7th Cir., 176 F. 2d 217,* at page 220, the Court stated:

> "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved. United States v. Zimmerman, 7 Cir., 108 F. 2d 370; Guzik v. United States, 7 Cir., 54 F. 2d 618; Malone v. United States, 7 Cir., 94 F. 2d 281. In the Zimmerman case, supra, the government determined taxpayer's gross income from his bank deposits. The defendant there sought to explain that substantially all of his income had been expended in the conduct

of his lottery business, and that therefore there was no net income upon which a tax was required. This court said, page 373, citing from 94 F. 2d page 288 of the Malone case:

'* * * * When, however, he became a witness and sought to explain, the jury was not bound to accept his story as true. * * *'

The defendant herein was under an obligation to keep correct books and records; he did not do so. Having adopted that course he cannot now sit back and insist that the government prove a complete debit and credit account."

II. THE EXTENT TO WHICH EXTRA-JUDICIAL ADMISSIONS OF THE DEFENDANT CAN BE USED AS EVIDENCE OF THE COMMISSION OF THE CRIME CHARGED HAS BEEN CLEARLY RULED ON IN THIS CIRCUIT; DEFENDANT'S NET WORTH AT THE BEGINNING OF PERIOD DURING WHICH ALLEGED EVASION OCCURRED IS A QUESTION FOR THE JURY ON CONFLICTING EVIDENCE.

In the ruling case of *DAVENA v. UNITED STATES, 9th CIR., 198 F. 2d 230* at page 231, this court stated:

"Much of the evidence tending to support the conviction was put in the record by two agents of the Bureau of Internal Revenue who told of their conversations with the appellant during the investigatory stages of the Bureau's pursuit of him. They recounted statements of the defendant which were highly damaging to his defense and undoubtedly influenced the jury greatly. It is now urged upon us that these extra-judicial statements of the defendant were improperly admitted into evidence because the crime was not proved independently of them, and thus that United States v. Fenwick, 7 Cir., 177 F. 2d 488 requires a reversal. Whatever

vitality the Fenwick case has in the light of United States v. Hornstein, 7 Cir., 176 F. 2d 217 which preceded it and appears to be in conflict, and United States v. Yoeman-Henderson, Inc., 7 Cir., 193 F. 2d 867, which strictly limits the Fenwick case, it is of no relevance in this circuit since here it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by a preponderance of proof. This being the case, the admissions of the defendant which were fully corroborated were properly given to the jury."

The court went further in the same case, at page 232:

"The government, as it was allowed to do, prosecuted the case by showing annual increases in appellant's net worth and by comparing these figures to income reported by Davena. In order to support a conviction on this net worth theory, the government had to establish the net worth of the defendant at the beginning of the period during which the alleged evasion occurred. The government proceeded to do this by valuing assets held by Davena at the end of 1943. The valuation of an electric train at $500 rather than $1500 is attacked, but it has support in the record since Davena signed a net worth statement supporting the government's position on the question of the train's value. There is conflict in the record on this question, but the resolving of the conflict is for the jury. Gendelman v. United States, 9 Cir., 191 F. 2d 993."

III. ORDER IN WHICH EVIDENCE SHALL BE RECEIVED IS IN THE DISCRETION OF THE TRIAL COURT, AND DEFENDANT CANNOT COMPLAIN OF ADMISSIONS OR CONVERSATIONS INTRODUCED BEFORE PROOF OF CORPUS DELICTI.

This portion of appellee's argument is directed against Specification of Error No. 1, and paragraph II of the Argument of Appellant's brief.

As to the quantum of proof of the evidence, corroborating a confession or admission of the defendant, see the quotation from *Davena v. United States, supra,* reading in part, as follows:

> "* * * since here it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by a preponderance of proof. This being the case, the admissions of the defendant which were fully corroborated were properly given to the jury."

This court has held on numerous occasions that the order in which evidence is received is in the discretion of the trial court, and it is not necessary to prove the corpus delicti prior to the reception in evidence of a confession or admission of the defendant. Thus, the court stated in *Blumenthal et al. v. United States,* 9th Cir. 158 F. 2d 883, at page 889,

> "Furthermore, the order in which evidence to prove the corpus delicti is to be received is largely a matter within the discretion of the trial court."

Again in *Adolfson v. United States,* 9th Cir. 159 F 2d 883, at page 888, this court stated:

> "The order in which evidence to prove the corpus delicti is to be received is not important and is largely a matter within the discretion of the trial court. If proof in the nature of independent corroborative evidence supports the introduction of a confession, the time of its introduction is not important. It is sufficient if it is forthcoming at some point in the trial. All of the evidence in this case on which the Government relied was properly

connected before the Government closed its case.

"During the course of the trial several objections were made to the admission of testimony as to what was said in conversations of officers with appellant and Amdursky regarding the purchase of the pens and watches. These objections were also rested on the ground that at the time the proof was offered the Government had not established the corpus delicti by any independent evidence, particularly as it related to the element of knowledge required by section 87. What we have said above disposes of this objection."

IV. THE GOVERNMENT DOES NOT RELY ENTIRELY ON INFERENTIAL PROOF FROM THE NET WORTH STATEMENT, BUT RELIES ALSO ON DIRECT PROOF THAT THE DEFENDANT RECEIVED INCOME WHICH HE DID NOT REPORT.

The record clearly reflects direct evidence that the defendant received income which he did not report. Thus, from the testimony of Eugene C. Verdugo, the defendant's accountant.

Q. What was said at that time by Mr. Calderon in his conversation with you?

A. I asked Mr. Calderon why there was so much difference in the income we showed on the books and what was claimed that he had made and he at the time stated and told me that on some locations he didn't put down the correct amount taken in because the owners or proprietors of these locations had stated and stipulated to him they didn't want the right amount down. (R. 131-132).

Q. Did he make any other explanation at that time of the discrepancy in his reported income and what was claimed he made?

A. Yes, he went very extensively into lost receipt

books, misplaced. I estimated with him and told him if he lost one receipt book which contained fifty sheets it could make a difference of one thousand to fifteen hundred dollars or possibly more receipts if that particular book had been lost and had not been reported to me. (R. 132).

Again from the affidavit of the defendant, (R. 107, 108, 109; Government's Exhibit 11:

During the years 1944 to 1949, inclusive, all of the income which I failed to report on the Income Tax returns filed by me for each of those years came from an understatement of receipts from coin-operated amusement devices. None of such unreported income came from the operation of my music store or from the Coronado Cafe. Receipts from those business were reported correctly. The understatement of income from coin-operated amusement devices came about in part by entering the receipt of money from various locations on memorandum paper which later was not transferred to permanent receipts, and therefore did not taken into account in the income reported from coin-operated machines. The understatement of such income also came about from the understatement on my location receipt books of money taken from coin machines. This happened in about thirteen of my locations. I did this because the proprietors of such locations requested me to understate the amount taken from the coin machines in my receipt books so that they would not have to report the full amount of their share. This understatement of income from my coin-operated machines also occurred by a certain number of receipt books being lost or misplaced by myself or my employees. Therefore, the receipts entered in those books were not turned in to my bookkeeper." (R. 108, 109).

V. ARGUMENT DIRECTED TO BALANCE OF APPELLANT'S BRIEF.

(1) For the reasons stated in subdivision I, hereof, the net worth statement was properly admitted in evidence, and testimony relative to that statement was properly received. That being so, there is no error in allowing the government's witness Webb to make the tax computations from those figures, as claimed in Specification of Error No. 3, inasmuch as this is an accepted method of proof.

(2) The Court's denial of defendant's motion for acquittal was proper and within the accepted test.

> "When a motion for a judgment of acquittal is made, the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the government, tends to show the defendant is guilty beyond a reasonable doubt." *United States v. Yeoman-Henderson, Inc., 7th Cir. 193 F. 2d 867* at page 869, and cases cited therein.

Neither the Spriggs case nor the Bryan case, cited by appellant, are in point. In the Spriggs case government was unable to produce any evidence other than the statement of the appellant. The court stated:

> "When the trial court sustained appellant's objection to the introduction of such financial statements (Exhibits 29, 30, 31, 32, the prosecution's evidence was reduced solely to the statements of appellant.
>
> "Whether this evidence, upon which the judgment below must stand or fall, is to be regarded as a confession, or as admissions, or as extra judicial statements, is of no consequence here. Under any name, they are insufficient to sustain the conviction, for there has been no independent proof of any crime having been committed. We deem it un-

necessary to decide whether the lower court erred, as appellant contends, in admitting this testimony of certain government agents concerning statements made to them by appellant. Even if the admissibility of such testimony be assumed, arguendo, the government case still falls far short of establishing the guilt of appellant by the further evidence required by our decision in Davena, Jr. v. United States, 9 Cir., 198 F 2d 230."

In the Bryan case, which as been repeatedly attacked, the converse was true.

"There were available to the auditor no financial statements, no books of Defendant showing assets and liabilities, and no admissions by the Defendant that could be used as an admitted, or definite, point of beginning by which to determine income by the "net worth and expenditure basis" as was attempted in this case."

The Fenwick case, cited by appellant, is not the law in this circuit.

CONCLUSION

Appellant points out in his Summary to the Argument that each of his Specification of Errors is based on the preceding error. The first error specified, in turn, is based on the $500.00 Cash in Hand figures. The Cash in Bank figures were clearly proven to the satisfaction of the jury. All other figures were admitted by stipulation and have not been contested. The government's evidence on the Cash on Hand figure came from the appellant's mouth, from the sworn affidavit, and lastly from the sworn net worth statement placed in evidence by appellant. As a practical matter, there is virtually no other way to prove such a figure. Appellant's attempts to answer his previous statements, at most, created a conflict in the evidence for the jury, and the jury obviously had no difficulty in accepting the appellee's case. Appellant has not, and cannot, explain his direct admissions of unreported income. Appellee requests an affirmance.

Dated, May 15, 1953.

Respectfully submitted,

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